



State of Connecticut  
GENERAL ASSEMBLY

Commission on Children



**TESTIMONY**

**COMMITTEE ON CHILDREN PUBLIC HEARING  
TUESDAY, FEBRUARY 17, 2015**

**SUBMITTED BY STEVEN HERNÁNDEZ, ESQ.  
DIRECTOR OF PUBLIC POLICY AND RESEARCH**

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Honorable Co-chairs, Senator Bartolomeo and Representative Urban, Ranking and other esteemed members of the Committee on Children:

My name is Steven Hernández, Attorney and Director of Public Policy and Research for the Legislature's Commission on Children.

My testimony today is on Raised HB-6722, An Act Concerning Concussions in Youth Athletics. Because of outstanding questions on the issue, I will specifically focus on potential immunity from liability for coaches and others meeting the requirements under this proposal. Notably, in our research we were able to find only three states that have some form of immunity for coaches and/or referees. Immunity generally involves protection from civil and/or criminal liability. Here, as in most cases, immunity ends where gross or wonton negligence begins.

Immunity is a time-tested principal in law which promotes good works, interventions, and participation in certain activities deemed beneficial to society by absolving the participant from some of the risk associated with that activity. A Good Samaritan law is a good example of such protection for those who give reasonable assistance to those who are injured, ill, in peril, or otherwise incapacitated. Immunity in this instance improves society by protecting the participant when faced with the (at times) hard hand of the law.

Youth concussion laws, however, are about accountability. Concussion laws level the playing field for coaches and their athletes by providing a clear standard for all to follow. Incidentally, clear standards also reduce the risk of lawsuits. It is true that by requiring concussion training for coaches and perhaps others, we are elevating the duty of care from that of a reasonable coach under the circumstances, to that of a reasonable coach trained in identifying and addressing concussions. Coaches with the best interest of their athletes in mind would agree that in the face of a lifetime of disability, this is not an unreasonable standard to uphold.

Given these principles, and the inherent protections for both coaches and athletes in law, and under this proposal, immunity or exemption from liability for coaches under this proposal may be ill advised for several reasons. Three immediately come to mind:

- Immunity here may run counter to accountability by absolving some coaches from their enhanced duty to act reasonably under the circumstances;
- Immunity for some may muddy the water for others involved in youth athletics, including those not directly impacted by current law or this bill, while potentially causing a chilling effect in identifying and addressing youth concussions. Muddy waters attract lawyers; and
- While blanket immunity for any activity is rarely a good idea, specific immunity for simple negligence creates questions of fact that are generally only resolved in the courts. Thus, instead of minimizing the potential for lawsuits, the opposite results.

I've attached to our testimony a very thoughtful article on the issues of liability and enforcement around youth concussion laws which we found useful in preparing our testimony.

The Commission also supports but will not testify other bills before the Committee today, including proposed house bills 5656 (child car seat installation) and 5658 (JJ educational surrogates). At your request we would be happy to submit more specific testimony on our support for these proposals.

In closing, I note that the Commission on Children served the Task Force in an organizing and administrative capacity. The Commission would like to thank the Co-Chairs of the Task Force, Dr. Michael Krinsky and Dr. David Wang, and the members of the task force, who span various areas of expertise and interest, for their leadership and service. Also, the Commission extends very special thanks to the Co-chairs of this Committee for your ongoing trust and leadership.

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# Protecting Kids' Melons: Potential Liability and Enforcement Issues with Youth Concussion Laws

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## COMMENTS

# PROTECTING KIDS' MELONS: POTENTIAL LIABILITY AND ENFORCEMENT ISSUES WITH YOUTH CONCUSSION LAWS

PHOEBE ANNE AMBERG\*

### I. INTRODUCTION

Sports are an important part of a child's life. Children have fun on the field, ice, and court, but sports provide children with much more than enjoyment. Children learn leadership, time commitment, team values, teamwork, determination, dedication, perseverance, and many other positive qualities by participating in athletic activities. According to National Football League (NFL) Commissioner Roger Goodell, "[youth] sports [] are essential to [the development of] our kids."<sup>1</sup> Most people who played a sport and were a part of a team when they were kids would agree. While youth sports are generally safe for the kids who participate, safety can still be improved.

Youth sports organizations that want to continue to improve safety focus on concussions; specifically, they focus on how to decrease the incidence of concussions and prevent the severe problems caused by concussions. While a concussion itself may be hard to prevent and can be an unfortunate result of playing a sport, the severe side effects of a concussion can easily be prevented. Since 1997, at least fifty youth football players from twenty different states have died or become seriously disabled from sustaining a concussion.<sup>2</sup> None of these young athletes should have had their lives cut short due to concussions. To prevent other young athletes from suffering from the easily preventable effects of concussions, forty-one states, Chicago, and the District

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1. *Part One: The Zackery Lystedt Youth Sports Concussion Law: Background*, NFL (Oct. 9, 2010), <http://www.nfl.com/videos/auto/09000d5d81c7c3c9/Part-one-The-Zackery-Lystedt-Youth-Sports-Concussion-Law-Background> [hereinafter *Part One*].

2. *Young Players, Serious Injuries*, N.Y. TIMES (Sept. 16, 2007), [http://www.nytimes.com/interactive/2007/09/16/sports/20070916\\_CONCUSSION\\_GRAPHIC.html](http://www.nytimes.com/interactive/2007/09/16/sports/20070916_CONCUSSION_GRAPHIC.html).

of Columbia have passed a youth concussion law.<sup>3</sup> Three states currently have pending youth concussion legislation, while the remaining six states are not even considering a youth concussion statute.<sup>4</sup>

The youth concussion laws that have been passed throughout the nation with support from the NFL and the Centers for Disease Control and Prevention (CDC) are an essential part of making sports safer for children. However, the issue with youth concussion laws, and the focus of this Comment, is whether states have been able to implement these laws to their fullest extent. Part II discusses youth concussions. Part III discusses the history of youth concussion statutes and provides a survey of the current statutes. Part IV considers the recently passed concussion law in Wisconsin. Part V examines the problems and effectiveness of implementing youth concussion laws and the potential liability of coaches and medical personnel under these concussion laws.

## II. YOUTH CONCUSSIONS

An essential part of youth concussion laws is educating coaches, parents, and athletes about concussions because they all play a crucial role in preventing catastrophic incidents caused by concussions. A concussion is a "mild traumatic brain injury" that affects memory, speech, balance, judgment, coordination, and reflexes.<sup>5</sup> Unfortunately, an athlete may not realize he has sustained a concussion because the symptoms, such as confusion, headache, and nausea, may not be obvious right after the incident.<sup>6</sup>

Youth concussions are more serious when compared to adult concussions because there is a higher chance of complications and permanent damage.<sup>7</sup> In general, children are more susceptible to concussions and require a longer time to become symptom-free.<sup>8</sup> Kids between the ages of six and fourteen have a higher risk of head injuries compared to any other age range.<sup>9</sup> In addition, children who suffer from head injuries are more likely than adults to have

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3. Lindsay Barton, *Strong Concussion Safety Laws in Place in Majority of States*, MOMSTEAM, <http://www.momsteam.com/health-safety/majority-of-states-have-youth-sports-concussion-safety-laws> (last updated Sept. 4, 2012); CHI., ILL., MUN. CODE ch. 7-22 (2011).

4. *Id.*

5. Kristina M. Gerardi, *Tackles that Rattle the Brain*, 18 SPORTS LAW. J. 181, 184 (2011).

6. *Id.*

7. See generally Marie-France Wilson, *Young Athletes at Risk: Preventing and Managing Consequences of Sports Concussions in Young Athletes and the Related Legal Issues*, 21 MARQ. SPORTS L. REV. 241 (2010).

8. *Id.* at 241.

9. *Id.* at 247.

brain swelling and cerebral edema.<sup>10</sup> As a result of the swelling, the structure of a child's brain could be harmed because his brain is still developing.<sup>11</sup> The evidence of such damage may not be detected until much later, far past the original injury.<sup>12</sup> Because concussions are more dangerous for children, they should have the best safety procedures available to prevent tragic events.

Unfortunately though, by virtue of being a youth athlete, a child is actually at a disadvantage when he suffers a concussion. Youth athletes do not usually have baseline medical tests before playing.<sup>13</sup> Baseline testing assesses a child's brain function without an injury so doctors can test a child after a suspected head injury, compare it to the baseline test, and more easily determine whether a child has suffered a concussion.<sup>14</sup> The baseline test also helps doctors verify when the child is symptom-free.<sup>15</sup> Furthermore, a team doctor or trainer is not usually on the sidelines when a child sustains a concussion,<sup>16</sup> so there is no one specifically watching for concussions and requiring a child who is suspected of sustaining a concussion to sit out. Since youth athletes do not have concussion specialists readily available or access to baseline medical tests, it is easier for them to hide their symptoms and return to play too soon.<sup>17</sup>

Returning to play too soon is a major problem because once a child has had one concussion, it is much easier for him to sustain another one and suffer from second-impact syndrome.<sup>18</sup> Second-impact syndrome leads to inflammation of blood vessels and substantial swelling of the brain, which causes respiratory failure.<sup>19</sup> There is a fifty percent chance that a person who suffers from second-impact syndrome will die, and those who survive will almost certainly be disabled.<sup>20</sup> It is imperative that someone who suffers a concussion be completely symptom-free before he plays again given the increased risk of second-impact syndrome.<sup>21</sup> As a result of a youth athlete who suffered from second-impact syndrome, Washington became the first

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10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at 241–42.

14. See Gerardi, *supra* note 6, at 221.

15. *Id.*

16. See Wilson, *supra* note 8, at 242.

17. See *id.* at 241–42.

18. *Id.* at 244.

19. Gerardi, *supra* note 6, at 186–87.

20. Erika A. Diehl, Note, *What's All the Headache?: Reform Needed to Cope with the Effects of Concussions in Football*, 23 J.L. & HEALTH 83, 92 (2010).

21. Gerardi, *supra* note 6, at 187.

state to pass a youth concussion law.<sup>22</sup> States have followed Washington's lead and have passed youth concussion laws to prevent other children from returning to play too soon after a concussion.

### III. HISTORY AND SURVEY OF YOUTH CONCUSSION STATUTES

The best way to reduce second-impact syndrome in children is through education and awareness of the dangers of concussions.<sup>23</sup> Prior to concussion awareness programs, coaches did not know enough about concussions to deal with them in an appropriate and safe manner.<sup>24</sup> Even so, education and awareness programs and guidelines regarding concussions were in effect before states began instituting concussion statutes. The CDC created guidelines by instituting its Heads Up program.<sup>25</sup> The CDC website provides information about preventing and dealing with concussions for coaches, parents, and athletes, including information sheets and online training courses.<sup>26</sup>

Similar to the CDC, the National Federation of State High School Associations (NFHS) established concussion guidelines. Unfortunately, the NFHS did not require each state's athletic association to adopt its guidelines.<sup>27</sup> However, some high school athletic associations have implemented the NFHS's concussion guidelines anyway.<sup>28</sup> For example, the Wisconsin Interscholastic Athletic Association (WIAA) requires that an athlete who displays symptoms of a concussion or becomes unconscious not return to play on the same day.<sup>29</sup> Furthermore, a student must be cleared by a health care professional, either a physician or licensed athletic trainer, before returning to play.<sup>30</sup> Obviously, these concussion guidelines are an important part of the education process, but one athlete's story led state legislatures to get involved and do more to keep youth athletes protected from the serious effects of

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22. Zackery Lystedt Law, WASH. REV. CODE § 28A.600.190 (2012).

23. See Glassman & Holt, *supra* note 5, at 33.

24. Matt Rybaltowski, *Young Player Helps Turn Trauma into Action on Concussions*, CBSSPORTS.COM (Feb. 14, 2010), <http://www.cbssports.com/nfl/story/12928497/young-player-helps-turn-trauma-into-action-on-concussions>.

25. *Heads Up: Concussion in Youth Sports*, CDC, <http://www.cdc.gov/concussion/HeadsUp/youth.html> (last updated May 29, 2012).

26. See *id.*

27. Glassman & Holt, *supra* note 5, at 32; see also NAT'L FED'N OF STATE HIGH SCH. ASS'NS, SUGGESTED GUIDELINES FOR MANAGEMENT OF CONCUSSION IN SPORTS (2011).

28. See *Concussions*, WIAA, <http://www.wiaawi.org/Health/Concussions.aspx> (last visited Oct. 17, 2012).

29. *Id.*

30. *Id.*

concussions.

The athlete who facilitated the first youth concussion statute in the United States is Zackery Lystedt, whose drive and perseverance on the football field led to a tragic and unfortunate event.<sup>31</sup> Lystedt was playing middle school football on October 21, 2006, when he sustained a concussion during the first half.<sup>32</sup> He returned to the game at the beginning of the second half, and, just seconds before the game ended, Lystedt sustained a second concussion.<sup>33</sup> He told his dad that his head hurt and that he could not see.<sup>34</sup> Shortly thereafter, Lystedt collapsed and had to be airlifted to Seattle where doctors performed emergency brain surgery to save his life.<sup>35</sup>

According to his neurosurgeon, Lystedt was minutes, maybe hours, away from dying.<sup>36</sup> To save Lystedt's life, doctors had to take his skull off on each side of his brain.<sup>37</sup> As a result, the doctors placed labels on each side of Lystedt's head to identify the lack of bone on either side of his head and to alert others that his brain was not protected.<sup>38</sup> Later, Lystedt had to be fitted with a helmet.<sup>39</sup> Lystedt's father, Victor, looked into his son's eyes and described him as not being there.<sup>40</sup> Lystedt could not talk for nine months and could not move any part of his body for thirteen months.<sup>41</sup> Six years after suffering his traumatic brain injury, Lystedt has continued to improve.<sup>42</sup> On June 10, 2011, he was able to walk across the stage to receive his high school diploma.<sup>43</sup> Lystedt and his family did not want other parents and their children to go through the same things they had to suffer through, so they met with their lawyer to draft a youth concussion bill.<sup>44</sup>

The Zackery Lystedt Law passed on May 14, 2009, and became effective

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31. See Rybaltowski, *supra* note 25.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Life Changed by Concussions*, ESPN (Jan. 31, 2012), <http://espn.go.com/video/clip?id=7525526&categoryId=5595394>.

37. *Id.*

38. *Id.*

39. *Part Three: The Zackery Lystedt Youth Sports Concussion Law: Meet Zackery Lystedt*, NFL (Nov. 30, 2010), <http://www.nfl.com/videos/auto/09000d5d81c7a785/Part-three-The-Zackery-Lystedt-Youth-Sports-Concussion-Law-Meet-Zackery-Lystedt>.

40. *Life Changed by Concussions*, *supra* note 37.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Part One*, *supra* note 1.



on July 26, 2009.<sup>45</sup> The Lystedt Law contains three elements:

(2) Each school district's board of directors shall work in concert with the Washington interscholastic activities association to develop the guidelines and other pertinent information and forms to inform and educate coaches, youth athletes, and their parents and/or guardians of the nature and risk of concussion and head injury including continuing to play after concussion or head injury. On a yearly basis, a concussion and head injury information sheet shall be signed and returned by the youth athlete and the athlete's parent and/or guardian prior to the young athlete's initiating practice or competition.

(3) A youth athlete who is suspected of sustaining a concussion or head injury in a practice or game shall be removed from competition at that time.

(4) A youth athlete who has been removed from play may not return to play until the athlete is evaluated by a licensed health care provider trained in the evaluation and management of concussion and receives written clearance to return to play from that health care provider.<sup>46</sup>

Because of the Lystedt Law, licensed health care professionals determine when athletes are ready to return to play and coaches no longer have to worry about making that decision.<sup>47</sup> The Washington legislature charged the Washington Interscholastic Activities Association (WIAAWA) to develop guidelines and provide other relevant information related to the Lystedt Law.<sup>48</sup> The WIAAWA lists the licensed health care providers under the law that can give written clearance to players to return to play after a concussion.<sup>49</sup> The WIAAWA allows only medical doctors, doctors of osteopathy, advanced registered nurse practitioners, physician assistants, and licensed certified athletic trainers to clear players.<sup>50</sup> The law itself provides that a volunteer who clears an athlete to return to play is not liable for civil damages unless "gross negligence" or "willful or wanton misconduct" is involved.<sup>51</sup>

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45. Zackery Lystedt Law, WASH. REV. CODE § 28A.600.190 (2012).

46. § 28A.600.190(2)-(4).

47. Rybaltowski, *supra* note 25.

48. § 28A.600.190(2).

49. *Licensed Health Care Providers*, WIAA, <http://www.wiaa.com/subcontent.aspx?SecID=628> (last visited Oct. 17, 2012).

50. *Id.*

51. § 28A.600.190(4).

Washington's youth concussion law has been an example for all states.

Since the passage of the Lystedt Law, forty-one states plus Chicago and the District of Columbia have passed similar laws.<sup>52</sup> The NFL and the National Collegiate Athletic Association (NCAA) support youth concussion laws by writing letters to state governors requesting the passage of youth concussion statutes.<sup>53</sup> In general, these youth concussion statutes contain the three elements that are in the Lystedt Law: (1) education, (2) removal of the athlete from play, and (3) medical clearance to return to play.<sup>54</sup> Also, the youth concussion statutes include the same provision found in the Lystedt Law that provides immunity to volunteers who clear athletes to return to play.<sup>55</sup> However, not all youth concussion statutes completely follow the Lystedt Law.

Some youth concussion statutes do not include all three of the elements listed above.<sup>56</sup> For example, the Wyoming youth concussion statute only includes the education component and does not require any district to adopt the protocol.<sup>57</sup> While the law only requires education, education *is* an essential component in making youth sports safer. Similarly, when Idaho's youth concussion statute first passed in 2010, it only included the education component.<sup>58</sup> The bill began with the three model elements of the Lystedt Law,<sup>59</sup> but the law that passed in 2010 only mandated that:

The state board of education shall collaborate with the Idaho high school activities association to develop guidelines and other pertinent information and forms to inform and educate coaches, both paid and volunteer, youth athletes, and their parents and/or guardians of the nature and risk of concussion

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52. CHI., ILL., MUN. CODE ch. 7-22 (2011); Barton, *supra* note 3.

53. See Letter from Roger Goodell, NFL Comm'r, to Christopher J. Christie, Governor, N.J. (May 21, 2010) (on file with author); Letter from Mark Emmert & Roger Goodell, NCAA President & NFL Comm'r, to Richard D. Snyder, Governor, Mich. (Jan. 11, 2012) (on file with author).

54. *Lystedt Law Overview*, NFLEVOLUTION.COM (Aug. 9, 2012), <http://www.nflevolution.com/article/The-Zackery-Lystedt-Law?ref=270>.

55. Wilson, *supra* note 8, at 285.

56. See *Concussion Legislation by State*, NFLEVOLUTION.COM (Aug. 14, 2012), <http://www.nflevolution.com/article/Concussion-Legislation-by-State?ref=767>; *Lystedt Law Overview*, *supra* note 55. Compare Zackery Lystedt Law, WASH. REV. CODE § 28A.600.190, with WYO. STAT. ANN. §§ 21-2-202(a)(xxxiii) (2012), 21-3-110(a)(xxxii) (2012) (only has educational component and does not require any district to adopt the protocols).

57. WYO. STAT. ANN. §§ 21-2-202(a)(xxxiii), 21-3-110(a)(xxxii).

58. H.R. 676, 60th Leg., 2d Reg. Sess. (Idaho 2010) (as amended).

59. Dustin Hurst, *Plan to Get Tough on Concussions Stalls in Committee over Legal Concerns*, IDAHOREPORTER.COM (Mar. 18, 2010), <http://www.idahoreporter.com/2010/plan-to-get-tough-on-concussions-stalls-in-committee-over-legal-concerns/>.

and head injury including risks associated with continuing to play after concussion or head injury.<sup>60</sup>

Representative Brent Crane wanted to remove the second and third elements—removal of the athlete from play and written clearance from a health care provider to return to play—due to fear of liability.<sup>61</sup> Crane did not want to require coaches to identify concussions while also having to coach the game because he believed it may create liability for coaches.<sup>62</sup> Representative Liz Chavez, who co-sponsored the bill, was saddened with the outcome of the law as she believed the law did not require anything to happen.<sup>63</sup>

Two years after Idaho passed its inadequate youth concussion statute, Idaho successfully revised its youth concussion statute to include all three tenets of the Lystedt Law.<sup>64</sup> Now, the Idaho youth concussion statute not only includes the three tenets, but also goes further because it requires “referees, game officials, game judges, and athletic trainers” to review concussion guidelines biannually.<sup>65</sup> The majority of youth concussion statutes require only a one-time concussion training and only for coaches.<sup>66</sup> The Idaho youth concussion statute illustrates a state that realized the need for a youth concussion statute but had concerns about liability so it only included the education component at first. Commendably, Idaho later recognized the need to improve its youth concussion law beyond the education component. Other states whose statutes are below the model legislation can look to Idaho as an example for improving their statutes.

Other states besides Idaho have gone beyond the Lystedt Law model legislation.<sup>67</sup> For instance, Colorado’s youth concussion statute goes further in some aspects of the education component.<sup>68</sup> The law states:

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60. IDAHO CODE ANN. § 33-1620(1) (2010) (The statute section was later changed to 33-1625).

61. William L. Spence, *Chavez’ Concussion Bill! Gets Denuded: Lewiston Democrat Says She’s Disappointed After House Deletes Enforcement Language*, LEWISTON MORNING TRIB. (Idaho), Mar. 24, 2010, at 2.

62. *Id.*; Dustin Hurst, *Stripped-Down Concussion Education Bill Clears House*, IDAHOREPORTER.COM (Mar. 25, 2010), <http://www.idahoreporter.com/2010/stripped-down-concussion-education-bill-clears-house/>.

63. Spence, *supra* note 62.

64. IDAHO CODE ANN. § 33-1625 (2012).

65. § 33-1625(3); Bryan Toporek, *Idaho Strengthens Youth-Concussion Law by Passing Revision*, EDUC. WEEK (Apr. 6, 2012, 3:01 PM), [http://blogs.edweek.org/edweek/schooled\\_in\\_sports/2012/04/idaho\\_strengthens\\_youth-concussion\\_law\\_by\\_passing\\_revision.html](http://blogs.edweek.org/edweek/schooled_in_sports/2012/04/idaho_strengthens_youth-concussion_law_by_passing_revision.html).

66. Toporek, *supra* note 66.

67. Jake Snakenberg Youth Concussion Act, COLO. REV. STAT. § 25-43-103 (2012); *see also* Lystedt Law Overview, *supra* note 55.

68. § 25-43-103; Ivan Moreno, *Colorado Concussions Law Is Nation’s Most Far-Reaching*, THE HUFFINGTON POST (Mar. 29, 2011), <http://www.huffingtonpost.com/2011/03/29/colorado->

(1) (a) Each public and private middle school, junior high school, and high school shall require each coach of a youth athletic activity that involves interscholastic play to complete an annual concussion recognition education course.

(b) Each private club or public recreation facility and each athletic league that sponsors youth athletic activities shall require each volunteer coach for a youth athletic activity and each coach with whom the club, facility, or league directly contracts, formally engages, or employs who coaches a youth athletic activity to complete an annual concussion recognition education course.<sup>69</sup>

Unfortunately, the education component of the Colorado law does not require action from parents and their kids like the model legislation does.<sup>70</sup> However, the law goes further than the model legislation with its requirements for coaches. Unlike other states' concussion laws that apply only to coaches in school sports programs and require only one-time concussion training, the Colorado statute mandates coaches from both public and private schools, Little Leagues, and Pop Warner leagues to take concussion classes and attend annual training.<sup>71</sup>

Some states have passed a youth concussion law with the three model elements and continue to improve upon it. Rhode Island passed a youth concussion statute that included the three elements of the model Lystedt Law, but Rhode Island continued to make it better.<sup>72</sup> The proposed legislation would have improved upon the law in two ways. First, it required that "[a]ll coaches and volunteers involved in a youth sport or activity covered by [the law] must complete a training course and a refresher course annually thereafter in concussions and traumatic brain injuries,"<sup>73</sup> as opposed to the 2010 law, which did not require annual classes.<sup>74</sup> Second, the proposed legislation stated that "[s]chool districts shall have all student athletes baseline or 'impact' tested prior to the start of every sport season,"<sup>75</sup> whereas the original statute only recommended that each athlete have baseline testing before the season

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69. § 25-43-103(1)(a)(b).

70. See § 25-43-103.

71. Moreno, *supra* note 69.

72. H. R. 5440, Gen. Assemb., Jan. Sess. (R.I. 2011).

73. *Id.*

74. See R.I. GEN. LAWS § 16-91-3(b) (2011).

75. H.R. 5440.

begins.<sup>76</sup>

Rhode Island's amended youth concussion law passed with the first improvement requiring an annual refresher course, but unfortunately, the second improvement requiring baseline testing did not get passed.<sup>77</sup> Requiring baseline testing would have improved Rhode Island's youth concussion law greatly because testing significantly increases a doctor's ability to detect a concussion objectively, so that the doctor does not have to rely on a child to communicate his symptoms.<sup>78</sup> Also, baseline testing allows the doctor to independently determine whether the child is actually symptom-free or if he is hiding his symptoms.<sup>79</sup>

Even though the proposed legislation did not pass in its entirety, it still demonstrates that states do not have to be content with their youth concussion law even if it has the three model components. States can continue to improve upon their legislation and continue to make youth athletes safer. Rhode Island's ability to take its original youth concussion law and improve upon it should serve as an example for other states to continue to improve their laws. In any event, it is important for all states to pass a youth concussion law because participants in youth sports are not adequately protected when there is no youth concussion law.

#### IV. WISCONSIN'S YOUTH CONCUSSION STATUTE

Wisconsin passed its youth concussion statute on April 2, 2012.<sup>80</sup> Before Wisconsin had a youth concussion statute, the WIAA already established concussion guidelines, which led some people to argue that the guidelines were enough and Wisconsin did not need a youth concussion statute.<sup>81</sup> The athletic association's concussion guidelines were definitely important when Wisconsin did not have a youth concussion statute, but Wisconsin's new law is necessary because it improves upon the guidelines and mandates action instead of only recommending it. The WIAA followed the NFHS's advice and adopted its concussion guidelines.<sup>82</sup>

The WIAA "strongly encourages coaches at all levels to take [a

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76. R.I. GEN. LAWS § 16-91-3(c).

77. R.I. Gen. Laws § 16-91-3 (2012) (as amended).

78. Gerardi, *supra* note 6, at 221-22.

79. *Id.*

80. WIS. STAT. § 118.293 (2012).

81. Don Walker, *Goodell Wants Concussion Law for Athletes*, JSONLINE (May 24, 2010), <http://www.jsonline.com/blogs/sports/94788854.html>.

82. *Concussions*, *supra* note 29.

concussion in sports] free course.”<sup>83</sup> Furthermore, the WIAA rule for return to play requires “[a] student who displays symptoms of concussion and/or is rendered unconscious shall not return to practice or competition during the same day. *The student shall not return to practice or competition until approved in writing by an appropriate health care professional.*”<sup>84</sup> Therefore, the education course seems to be voluntary, while the return to play rule seems to be mandated by the WIAA.

Still, the Wisconsin youth concussion statute improves upon the WIAA concussion guidelines. First, in comparison to the WIAA concussion guidelines, the education component of the law is required, which includes a concussion information sheet signed by the athlete every year.<sup>85</sup> The law calls upon the WIAA to work with the Department of Public Instruction to develop education guidelines, which the WIAA has already done.<sup>86</sup> Second, the concussion law applies to anybody who engages in a youth athletic activity, which means “an organized athletic activity in which the participants, a majority of whom are under 19 years of age, are engaged in an athletic game or competition against another team, club, or entity, or in practice or preparation for an organized athletic game or competition . . . .”<sup>87</sup> Therefore, the law covers public and private schools, athletic clubs, and other organizations.<sup>88</sup> As a result, the law extends past what the WIAA concussion guidelines can cover because the WIAA guidelines can only apply to those schools that are a part of the association.

While the WIAA concussion guidelines may have seemed like an acceptable way to manage concussions, the youth concussion law is essential because having a law about concussion management has a greater effect than just having guidelines from an athletic association. When asked about the law while it was still pending, Dave Anderson stated, “We need the help this law would provide in terms of making a stronger statement about the importance of education and the significance of head trauma.”<sup>89</sup>

Additionally, while the WIAA concussion guidelines are important, having only the WIAA guidelines for concussion management was clearly not

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83. *Id.*

84. *Id.*

85. § 118.293(3).

86. § 118.293(2); *Concussions*, *supra* note 29.

87. § 118.293(1)(c).

88. Don Walker, *Bill on Concussions Hits Home with Injured Teen*, JSONLINE (Oct. 20, 2011), <http://www.jsonline.com/news/wisconsin/bill-on-concussions-hits-home-with-injured-teen-132290068.html>.

89. Don Walker, *Lawmakers Urged to Pass Concussion Guidelines: Bill Would Affect State Athletes Ages 11 to 19*, MILWAUKEE J. SENTINEL, Oct. 5, 2011, at B3.

enough since youth athletes continued to suffer from second-impact syndrome.<sup>90</sup> For example, Josh Inhof, a Wisconsin high school football player, most likely suffered a concussion during practice on October 10, 2011; three days later, Inhof took one or two more hits that left him unconscious.<sup>91</sup> Luckily, Josh was not in as poor condition as Zackery Lystedt, but Josh still had headaches, trouble focusing, and missed school until he felt better.<sup>92</sup> Although, Josh's father, a youth football coach, knew the WIAA guidelines of sitting out athletes and requiring clearance from a health care professional, he did not question his son as intensely as he should have when Josh told his father he got "rocked" at practice.<sup>93</sup> Therefore, the law has improved upon the WIAA guidelines in that athletes and their parents must be educated about concussions, but even with improvements to the current guidelines, issues still exists with the Wisconsin law and other youth concussion statutes.

#### V. EFFECTIVENESS AND PROBLEMS WITH YOUTH CONCUSSION STATUTES

While the youth concussion statutes are a great improvement in the safety of youth sports, whether the statutes are actually effective remains doubtful. The youth concussion statutes would be effective if the statutes educated students, parents, and coaches about concussions and prevented student-athletes from returning to play while still being symptomatic. Additionally, the effectiveness of a statute is questionable when no enforcement mechanism or consequence for noncompliance exists. Moreover, the youth concussion laws present issues of liability for coaches and medical professionals. A youth concussion statute cannot meet its potential if it is not effective or if it has no enforcement procedures.

##### A. *Effectiveness of the Youth Concussion Statutes*

The passage of youth concussion statutes in almost all the states in America is a success in and of itself, but the true success comes when a youth concussion statute is actually effective at accomplishing what it was set out to do: prevent student-athletes from returning to play before being fully recovered from their concussions, thereby reducing the incidence of second-impact syndrome. The main issue regarding effectiveness of the concussion statutes is the lack of enforcement. Other issues relating to effectiveness include: lack of ability to implement the statute in rural areas, lack of baseline

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90. See Walker, *supra* note 89.

91. *Id.*

92. *Id.*

93. *Id.*

neuropsychological testing, and lack of medical personnel on sidelines.

In general, the youth concussion statutes do not have any enforcement mechanisms.<sup>94</sup> Specifically, there are no penalties, criminal or civil, for those who do not comply.<sup>95</sup> One senator who voted against the Lystedt Law was concerned about the lack of consequences for those who do not observe the law.<sup>96</sup> This concern is very real when the protection of a young athlete's brain is so important and those who disobey the law cannot be held accountable. Similarly, enforcing a law that has absolutely no penalties for violations is a big problem. If someone finds out that a person has not followed the protocols set forth in the concussion statutes, no recourse is available against that person even though he has endangered a child. For example, Wisconsin's youth concussion law expressly states that there is no cause of action against any person under the law.<sup>97</sup>

The only concussion statute that has a type of enforcement mechanism is the concussion law for the City of Chicago.<sup>98</sup> Any school that does not observe the concussion law will have to pay the city water or sewer charges, which the school is usually exempt from paying.<sup>99</sup> It is still uncertain whether this enforcement mechanism is a sufficient penalty for those who violate the law. But at least the law provides some kind of penalty, so a person who is monitoring the law can enforce it. Regardless, the youth concussion laws have other issues.

Besides the lack of enforcement, concussion statutes may not be as effective as possible due to a lack of policies that should be required as part of the law. The concussion statutes do not require baseline neuropsychological testing before the start of the season.<sup>100</sup> The purpose behind baseline testing is to make it easier to determine when a child is back to his pre-concussion self.<sup>101</sup> For example, some parents in Washington have requested that their

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94. See generally *Youth Concussions FAQ*, NFLEVLUTION.COM (Aug. 15, 2012), <http://www.nflevolution.com/article/Youth-Concussions-FAQ?ref=936>.

95. *Id.*

96. Chantal Anderson, *State Lawmakers Approve Concussions Bills for Young Athletes: The State Legislature Has Passed Bills Aimed at Preventing Traumatic Brain Injuries Among Young Athletes*, SEATTLE TIMES, Mar. 11, 2009, [http://seattletimes.com/html/politics/2008838865\\_concussionbill10m.html](http://seattletimes.com/html/politics/2008838865_concussionbill10m.html).

97. WIS. STAT. § 118.293(6) (2012).

98. See generally CHL, ILL., MUN. CODE ch. 7-22-040 (2011).

99. *Id.*

100. Rhode Island has pending legislation that would require baseline testing. See H. R. 5440, Gen. Assemb., Jan. Sess. (R.I. 2011); see also Alan Schwarz, *Despite Law, Town Finds Concussion Dangers Lurk*, N.Y. TIMES, Sept. 23, 2010, at B15.

101. See Schwarz, *supra* note 101.



schools institute baseline testing, but most schools have declined to do so because it is not required by the Lystedt Law, it is not recommended by their insurance or the WIAAWA, and the schools are worried about liability in instances where the testing is not administered correctly and a child is allowed to come back before he is ready.<sup>102</sup>

Other than issues of liability, schools do not require baseline testing due to the cost of implementing the program.<sup>103</sup> However, when a child could be at risk of suffering from second-impact syndrome because the school did not have baseline testing, no amount of money is too great. Refusal by the schools to implement a program that could increase safety for students exemplifies the constraints of the youth concussion laws.<sup>104</sup> The youth concussion laws are not effective when they do not require baseline testing and schools fear liability when they could voluntarily put a great program into action.

Additionally, the youth concussion statutes cannot be effective when the laws do not require medical professionals to be on the sidelines. Lawmakers were concerned with the ability of rural communities to meet such a requirement due to cost.<sup>105</sup> For example, the Lystedt Law does not include such a provision,<sup>106</sup> and without the requirement only thirty-four percent of high schools in Washington have trainers who are knowledgeable about concussions.<sup>107</sup> In rural Sequim, Washington, a junior varsity player who sustained a concussion was not examined on the sidelines by any professional because medical professionals only attended varsity games.<sup>108</sup> As a result, the player's parents had to drive their son to a fire station so that an ambulance could take him to the hospital.<sup>109</sup> Even though the laws require coaches, parents, and students to become educated about the signs of concussions,<sup>110</sup> the presence of a trainer on the sideline who has specialized instruction in concussions is an important component to increase safety for student-athletes.<sup>111</sup>

Even outside rural communities, there have been issues regarding

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102. *Id.*

103. Diehl, *supra* note 21, at 117.

104. Schwarz, *supra* note 101.

105. *Id.*

106. See generally Zackery Lystedt Law, WASH. REV. CODE § 28A.600.190 (2012); see also Schwarz, *supra* note 101.

107. Schwarz, *supra* note 101. In the United States overall, only forty-two percent of high schools have trainers who are knowledgeable in concussions.

108. *Id.*

109. *Id.*

110. See § 28A.600.190(2).

111. Schwarz, *supra* note 101.

implementing the concussion laws and ensuring student safety. Boston University researchers approached a youth football program to provide trainers at games and practices to monitor for concussions and coordinate treatment.<sup>112</sup> The football program declined the offer due to “time and administrative issues.”<sup>113</sup> Similar to the reasons why schools have declined to implement baseline testing, the youth football club may have had some fear of liability associated with allowing these volunteers to be on the sidelines. While cost has also been cited as a reason for not requiring medical personnel on sidelines, no excuse exists to deny young kids the extra protection needed when individuals who are competent in detecting concussions volunteer their services.

Furthermore, the laws are certainly not effective when medical personnel are vague in their written return to play authorization. While the following situation may not be representative of how the law has been implemented, even one child who could be at risk for returning to play before he is completely asymptomatic is a problem. Another football player in Sequim, Washington was given discharge papers at the emergency room that stated, “[m]ay return to sports when able.”<sup>114</sup> It is entirely possible that these discharge papers may not satisfy the law’s requirement that written authorization must be given before a child may return to play. There is also the possibility that it could be enough, which would place the child in danger when he feels he is able to return to play but he is not actually symptom-free. The emergency room doctor should have written that further evaluation by the child’s primary doctor was required before activity could resume. This one example demonstrates that the law has not been effective when doctors do not provide the medical advice requested by the law, which requires athletes to be completely asymptomatic before returning to play. Children returning to play before being symptom-free is still a problem even in the state where the first youth concussion law passed. Related to the effectiveness of the youth concussion statutes is the potential liability associated with the concussion statute.

*B. Liability or Lack Thereof Associated with the Youth Concussion Statute*

It is hard to enforce a law that does not provide a deterrent, that is, where somebody who violates the law is not held accountable. According to NFL Health and Safety, the youth concussion statutes do not impute greater liability

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112. *Id.*

113. *Id.*

114. *Id.*

on those individuals affected by the laws.<sup>115</sup> In general, the youth concussion statutes will decrease liability because the statutes create a consistent standard that everyone must follow.<sup>116</sup> Without the youth concussion laws, school districts would likely have had their own standard, forcing coaches and doctors to keep track of several different standards. As a result of the uniform rules, the concussion statutes should decrease litigation, as coaches and other parties will have better knowledge to deal with concussions, which will consequently decrease injuries.<sup>117</sup> However, there are still issues with the liability, or lack thereof, associated with the laws, including the possibility of holding some individuals potentially liable while others are seemingly exempt.

Legislators were concerned about the potential liability associated with the laws. Liability is the main reason the Idaho youth concussion statute only included the education component of the model legislation at first.<sup>118</sup> The Idaho State Affairs Committee questioned the potential liability of coaches when they are asked to remove a player who is suspected of sustaining a concussion.<sup>119</sup> Similarly, one Washington senator voted against the Zackery Lystedt Law.<sup>120</sup> He was worried about who would be held accountable for the decision to remove a player from a game or practice.<sup>121</sup> In fact, the Lystedt Law does not mention who should remove the player, only that the player "shall be removed."<sup>122</sup>

The liability concerns are not without merit. In general, the concussion statutes remove negligence liability for volunteers who allow a player to return to play.<sup>123</sup> But there is no mention of removing the coach's liability, or anyone else's liability for that matter, for civil damages for not taking a child out of the game. A coach is there to manage the game and may not be as attentive as needed to determine whether a player has suffered a concussion.<sup>124</sup> The Wisconsin concussion statute actually addresses the liability concern for coaches by removing civil liability for "[a]ny athletic coach, official involved in an athletic activity, or volunteer who fails to remove a person from a youth athletic activity [who is suspected of having a

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115. *Youth Concussions FAQ*, *supra* note 95.

116. *Id.*

117. Wilson, *supra* note 8, at 275.

118. See IDAHO CODE ANN. § 33-1620 (2010) (The statute section was later changed to 33-1625).

119. Spence, *supra* note 62.

120. Anderson, *supra* note 97.

121. *Id.*

122. Zackery Lystedt Law, WASH. REV. CODE § 28A.600.190(3) (2012).

123. See § 28A.600.190(4).

124. Spence, *supra* note 62.

concussion].”<sup>125</sup> Other coaches, in states where liability is not clearly defined, should be wary of liability and the ambiguity associated with the law regarding who is actually responsible for removing a player who may have sustained a concussion.

### 1. Potential Liability of Coaches

Coaches can be liable for their actions regarding student-athletes.<sup>126</sup> Every coach is held to the standard of a reasonable coach.<sup>127</sup> A coach’s duties that come into play with the concussion statutes include (1) a duty to provide adequate supervision and (2) a duty to provide swift and proficient medical assistance.<sup>128</sup> Under the duty to provide adequate supervision, the coach is required to reasonably supervise games and practices.<sup>129</sup> For instance, a coach could breach the duty of adequate supervision by encouraging a player who has been hurt to continue to play.<sup>130</sup> Under the duty to give swift and proficient medical assistance, a coach needs to know if medical staff is available and, if not, a coach needs to determine where the medical staff will be.<sup>131</sup> Therefore, when coaches have an injured athlete, they have the responsibility to give aid before emergency help arrives and to send a player to receive medical assistance.<sup>132</sup> Coaches need to be aware of these general duties so they do not act below the standard of care.

Although coaches must not breach their general duties and are ordinarily held to the standard of care of a reasonable coach, under the youth concussion statutes, a coach may be held to a higher standard of care.<sup>133</sup> In *Cerny v. Cedar Bluffs Junior/Senior Public School*, the Nebraska Supreme Court determined the standard of care of a coach to be “that of the reasonably prudent person holding a Nebraska teaching certificate with a coaching endorsement.”<sup>134</sup> The coaching endorsement required “familiarization with the common symptoms of a concussion in order to enable a coach to make a reasoned determination of when to withhold a student athlete from competition until a medical professional evaluates the athlete and clearance is

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125. WIS. STAT. § 118.293(5)(a) (2012).

126. See GLENN M. WONG, *ESSENTIALS OF SPORTS LAW* 110–17 (4th ed. 2010).

127. *Id.* at 110.

128. See *id.* at 110–17.

129. *Id.* at 111.

130. *Id.*

131. *Id.* at 115.

132. *Id.* at 116.

133. Wilson, *supra* note 8, at 275.

134. 628 N.W.2d 697, 706 (Neb. 2001).

obtained.”<sup>135</sup>

According to *Cerny*, a majority of coaches would likely be held to a standard of care that includes concussion education.<sup>136</sup> Overall, the youth concussion statutes require coaches to be educated about concussions.<sup>137</sup> For example, the Lystedt Law requires the WIAAWA and each school district to come up with concussion guidelines and information to disseminate to coaches.<sup>138</sup> Most statutes have a very vague education requirement, which is put into action with the help of the school districts and athletic associations. A court would likely find even the vague education element of the youth concussion law analogous to the Nebraska coaching endorsement because the law charges the state’s athletic association to implement explicit education guidelines.<sup>139</sup> Either way, a coach needs to be very cautious of his potential liability under the youth concussion statutes.

## 2. Potential Liability of Medical Personnel

Another group of people who may need to be cautious are medical professionals. Medical professionals are held to different standards of care depending on the certificates and training they hold.<sup>140</sup> For example, a concussion specialist is held to a higher standard of care than a general practitioner.<sup>141</sup> Notwithstanding the youth concussion statutes, a doctor who does not diagnose a concussion and allows a player to play has the potential to be liable for negligence.<sup>142</sup> But a doctor will not be negligent as long as his decision is within the realm of the accepted standard of care for a doctor.<sup>143</sup>

The youth concussion statutes require certain medical professionals to provide written clearance for players to return to play.<sup>144</sup> This responsibility seems to hold medical professionals, who make the written authorization, liable for negligence. However, the youth concussion statutes remove liability for medical professionals who are volunteers and authorize a child to return to

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135. *Id.*

136. See Wilson, *supra* note 8, at 271.

137. *Lystedt Law Overview*, *supra* note 55.

138. Zackery Lystedt Law, WASH. REV. CODE § 28A.600.190(2) (2012).

139. The Colorado concussion statute requires coaches to participate in concussion training annually, which would definitely lead to a higher standard of care like in *Cerny*. See Jake Snakenberg Youth Concussion Act, COLO. REV. STAT. § 25-43-103(b) (2012).

140. WONG, *supra* note 127, at 138.

141. Wilson, *supra* note 8, at 279.

142. *Id.* at 276.

143. *Id.* at 277–78.

144. *Lystedt Law Overview*, *supra* note 55.

play.<sup>145</sup> The statutes do not define who is considered a volunteer. A volunteer is usually someone who is not being paid.<sup>146</sup> Therefore, it would seem that a student who goes to his normal doctor to be cleared would not be covered, that is, not protected from liability, under the statutes since the doctor received pay for his services. Wisconsin's youth concussion statute remedies this issue by stating it "does not create any liability for . . . any person."<sup>147</sup>

Medical professionals in other states should also be concerned about liability because a young athlete is less likely to go to a concussion specialist and more likely to be seen by either an emergency room doctor or his pediatrician who is not specialized in the diagnosis and treatment of concussions.<sup>148</sup> It is entirely possible that a child may be cleared to play who has not fully recovered, and the medical doctor could be subject to liability.

Although there may be a potential for liability, youth concussion statutes are helpful in decreasing liability. Doctors will be more cautious and wait a longer period of time before authorizing a child to return to play. Similarly, as a result of the youth concussions law, medical personnel may be more aware of the concussion protocol and have a better understanding of how to make sure a player is fully recovered from a concussion.<sup>149</sup>

## VI. CONCLUSION

Concussion laws are essential to increasing safety in youth sports. All three elements of the Lystedt Law model legislation are important. Coaches, athletes, and parents need to be educated about the severity of a concussion. Education will create cooperation to make sure the athlete who suffered the concussion is taken out of the game and will not participate until completely symptom-free and cleared by a medical professional. Every state should pass a concussion law that contains, at minimum, the three model elements of the Lystedt Law so children can at least be protected more than if there was no statute.

Still, there are obvious faults with the legislation, as there are seemingly

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145. See Zackery Lystedt Law, WASH. REV. CODE § 28A.600.190(4) (2012). The WIAAWA allows the following medical personnel to authorize players to return to play: medical doctors, doctors of osteopathy, advanced registered nurse practitioners, physician assistants, and licensed certified athletic trainers. *Licensed Health Care Providers*, *supra* note 50.

146. BALLENTINE'S LAW DICTIONARY 1352 (3d ed. 1969) (defining volunteer as "One who works for another without engagement of services.")

147. WIS. STAT. § 118.293(6).

148. Wilson, *supra* note 8, at 279.

149. The athletic associations provide return to play programs. See *Concussions*, *supra* note 29.

no penalties or fines for violating the rules. States may not be able to implement the law as easily as they might have thought. Zackery Lystedt and his family made it their mission to pass a concussion law in Washington so that no other family would have to go through what they continue to tackle every day. However, it is entirely possible that other youth athletes may suffer the same fate as Zackery Lystedt because a coach or athlete did not take the concussion law seriously since the law does not have any penalties for noncompliance.

States should require baseline testing and medical professionals to be on the sidelines to further increase protection for youth athletes. Schools worry about the cost of these requirements, but schools could ask athletic trainers or other medical professionals to volunteer their time and solicit parents to help with the cost of baseline testing. Legislators should at least implement a fine for those who do not obey the law. Since cost is a concern for youth sports organizations, a fine is a suitable deterrent, as the organizations do not have the money to spend on fines. For those that end up having to pay the fine, the money could go to a concussion education fund.

The current laws have no legal penalties or fines in the laws themselves, but the natural penalty for not following the law could mean the end of a playing career, or much worse, for an athlete. At this point, with no enforcement measures written into the law, the natural consequences have to be an appropriate deterrent for coaches, parents, athletes, and medical professionals to abide by the law. For others involved, the threat of litigation can possibly deter them from noncompliance. In the future, all states will have passed a concussion law and will continue to improve on those laws, like adding penalties for noncompliance.

